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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PAUL J. OXFORT
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

IS 18 U.S.C. § 793(e) UNCONSTITUTIONAL WHERE COMPLIANCE WOULD HAVE COMPELLED PETITIONER TO INCRIMINATE HIMSELF IN VIOLATION OF THE FIFTH AMENDMENT?

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PAUL J. OXFORT,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces, *United States v. Oxfort*, 44 M.J. 337 (C.A.A.F. 1996),[1] affirming the opinion of the Navy-Marine Corps Court of Military Review is reprinted as Appendix A at

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[1] At the time of the printing of this petition, page numbers had not yet been published for this opinion. Petitioner will therefore cite to the appendix throughout this petition.

Pet. App. 1a. The unpublished opinion of the Navy-Marine Corps Court of Military Review,[2] *United States v. Oxfort*, No. 91-2649 (N.M.C.M.R. October 8, 1993) is reported as Appendix B at Pet. App. 15a.

JURISDICTION

The United States Court of Appeals for the Armed Forces affirmed the decision of the Navy-Marine Corps Court of Military Review on August 30, 1996 (Appendix A at Pet. App. 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment provides, in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself.

18 U.S.C. § 793(e) provides:

> Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national

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[2] This Court has since been renamed the Navy-Marine Corps Court of Criminal Appeals.

> defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

Petitioner was authorized to possess numerous classified documents within the confines of a specific secured facility in connection with his duties. (R. at 17.) The offense for which he was convicted under 18 U.S.C. § 793(b) and (e) stems from his intentionally removing documents from their proper storage facility, placing them in his car, and then allowing them to be delivered to Japanese law enforcement authorities when his car was impounded upon his arrest following a botched larceny. (R. at 40-41.)

Petitioner was tried by military judge alone at a general court-martial on June 18, 1990. Pursuant to his pleas, Petitioner was convicted of violating a lawful general regulation by wrongfully removing, copying or

failing to properly safeguard classified materials (3 specifications); housebreaking; and violating 18 U.S.C. § 793(b), (e), and (f) and 18 U.S.C. § 798(a)(4) for wrongfully removing, failing to deliver, and failing to properly safeguard classified materials (4 specifications), in violation of Articles 92, 130, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 930, and 934, respectively. Petitioner was sentenced to confinement for 15 years, reduction to the lowest enlisted paygrade E-1, forfeiture of all pay and allowances, and a dishonorable discharge from the United States Navy. Both the Navy-Marine Corps Court of Military Review and the Court of Appeals for the Armed Forces affirmed the findings and sentence.

REASON FOR GRANTING REVIEW

PETITIONER'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION WAS VIOLATED WHERE 18 U.S.C. § 793(e) REQUIRED HIM TO RETURN CLASSIFIED DOCUMENTS HE HAD STOLEN, AN ACTION REQUIRING HIM TO INCRIMINATE HIMSELF IN THE THEFT OF THE DOCUMENTS.

A. COMPLIANCE WITH 18 U.S.C. § 793(e) BY PETITIONER WOULD HAVE BEEN AN ACT THAT WAS TESTIMONIAL AND INCRIMINATING

The Self-Incrimination clause of the Fifth Amendment reads: "No person . . . shall be compelled in any criminal case to be a witness against himself." This fundamental constitutional right reflects a "judgment . . . that the prosecution should [not] be free to build up a criminal

case, in whole or in part, with the assistance of enforced disclosures by the accused." *Ullmann v. United States*, 350 U.S. 422, 427 (1956). The privilege protects a person "against being incriminated by his own compelled testimonial communications." *Fisher v. United States*, 425 U.S. 391, 409 (1976). Therefore, two elements must be present for the privilege to apply: the compelled communication must be **incriminating and testimonial.** *United States v. Doe*, 465 U.S. 605 (1984)(*Doe I*).

A "testimonial communication" is a communication, verbal or non-verbal, which explicitly or implicitly relates a factual assertion or discloses information. *Doe v. United States*, 487 U.S. 201 (1988)(*Doe II*). This Court has addressed the issue of whether the act of producing subpoenaed documents might have some protected testimonial aspects. An act of production "could constitute protected testimonial communication because it might entail an implicit statement of fact: by producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic." *Doe II*, 487 U.S. 209 (1988). Indeed, this Court has acknowledged that the difficult question of whether a compelled communication is testimonial for purposes of applying the Fifth Amendment often depends on the facts and circumstances of the particular case. *Fisher*, 425 U.S. at 410.

In *Fisher*, several attorneys contested as unconstitutional a summons issued by the Internal Revenue Service which sought the production of certain documents belonging to their clients. *Id.* at 394. Contained in the subpoenaed documents, which purportedly were incriminating, were analyses of the

taxpayers' income and expenses prepared by their accountants. *Id.* The taxpayers were under investigation for possible civil or criminal violations of the federal income tax laws. *Id.* The attorneys argued, among other things, that because of the incriminating nature of the documents, the order would violate the clients' Fifth Amendment Right against self-incrimination. *Id.* at 395.

This Court rejected this argument and ruled the summonses constitutional. *Id.* at 414. Central to the holding, however, was a crucial distinction drawn between the communication of potentially incriminating evidence in the documents themselves, and the communication of evidence in the **production** of the documents:

> The Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications. . . . The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else. The **act of producing** evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced.

Id. at 409-10. (emphasis added).

Ultimately, this Court stated that because the incrimination stemmed from the contents of the documents and not the production of them, the privilege against self-incrimination did not apply. *Id.* at 414. In other words, although the summons may compel **incriminating** evidence, it would not compel **testimonial** evidence. *Id.* at 412.

This Court came to a different conclusion in *Doe I*, a case similar to *Fisher*. There the grand jury subpoenaed the respondent, an owner of several sole proprietorships, seeking production of business records related to his companies. *Doe I*, 465 U.S. at 607. The District Court and Court of Appeals held that the subpoena violated the Fifth Amendment. *Id.* In affirming, this Court noted the important distinction made in *Fisher*. It held that based on the reasoning of *Fisher*, the contents of the business documents in respondent's possession were not privileged under the Fifth Amendment. *Doe I*, 465 U.S. at 612. The documents, although potentially incriminating, were voluntarily prepared and were therefore not testimonial. *Id.* at 611.

This Court did state, however, that because the act of production itself would have testimonial significance, the privilege against self-incrimination applied. "A government subpoena compels the holder of the document to perform an act that may have **testimonial** aspects and an **incriminating** effect." *Id.* at 612 (emphasis added). This Court favorably quoted the Court of Appeals:

> [W]e find nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad

> documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control. The most plausible inference to be drawn from the broad-sweeping subpoenas is that the Government, unable to prove that the subpoenaed documents exist--or that the appellee even somehow connected to the business entities under investigation--is attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary informant against himself.

Id. at 613-14 n.12.

The act of production would have compelled the respondent in *Doe I* to "admit that the records exist, that they are in his possession, and that they are authentic." *Id.* at 613 n.11. This evidence would testify to the respondent's guilt, which would be both **testimonial and incriminating**.[3]

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[3] Both *Fisher* and *Doe I* are based on the "collective entity" doctrine. In short, the doctrine stands for the proposition that inanimate entities--e.g. corporations, labor unions, partnerships--have no rights under the Fifth Amendment. Therefore, officials working for them may not assert their personal rights under the Fifth Amendment to protect the entity, **even if the content of the entity's records incriminate them personally.** In *Fisher*, the petitioner's invocation of the Fifth Amendment was deemed merely an attempt to protect the corporation, while in *Doe I* the petitioner did so to protect himself. Appellant cites the "collective entity" doctrine only for its analysis of how the Fifth Amendment applies to acts of production which are both **testimonial and incriminating**.

In Petitioner's case, the act of production--or delivery--required by 18 U.S.C. § 793(e) poses a serious constitutional problem: Petitioner, the possessor of the documents, stole them. Requiring him to deliver these same documents to an authorized official is to require him to be "the primary informant against himself." *Id.* at 613-14 n.12.

Petitioner was charged and convicted under 18 U.S.C. § 793(b) [793(b)] for stealing the documents, and then under 18 U.S.C. § 793(e) [793(e)] for failing to deliver them. Compliance with 793(e) would have had a testimonial and incriminating consequence, i.e., Petitioner would have communicated to the government that he was the one who stole the documents. The act of production would have been a non-verbal communication which implicitly would have related "a factual assertion" or disclosure of information. *Doe II*, 487 U.S. at 201. The act would have admitted that the "records exist, that they are in his possession, and that they are authentic." *Doe I*, 465 U.S. at 613 n.11. With this evidence the government's case against Petitioner for stealing the papers would have been established. Thus, 793(e)'s requirement that someone like Petitioner, the thief of classified documents, deliver to the government the very same documents is unconstitutional.

The lower court seemed ambivalent on this issue. In the beginning of its opinion the court indicated that 793(e)'s delivery requirement did not have "testimonial significance" in this particular case. *Oxford*, 44 M.J. at _ (Pet. App at 6a). But then the court seemed to re-examine the issue by musing over "whether surrender of the documents, or what is commonly called the act of production, is testimonial." *Id.* at _(Pet. App. at 10a).

To this the court first stated that "whether the act of production is testimonial has perplexed the Supreme Court." *Id.* Then, soon thereafter, the court cryptically closed its opinion by stating that there was no need to address the issue of testimonial significance in Petitioner's case because "if this act had any testimonial significance, it is excluded from protection under the required-records exception as found by the Supreme Court." *Id.* at _(Pet. App. at 11a).

B. THE REQUIRED RECORDS EXCEPTION

The required-records exception was first promulgated by this Court in *Shapiro v. United States*, 335 U.S. 1 (1948). There the petitioner, a wholesaler of fruit and produce, was obligated under the Emergency Price Control Act to keep and preserve for examination various records that he would customarily maintain. *Id.* at 7. The record keeping and inspection requirements were designed not merely to obtain information for assistance in prescribing regulations or orders under the statute, but also to aid in the administration and enforcement of the Act. *Id.* at 8. The petitioner argued that the production requirement of the statute violated his right against self-incrimination because the **contents** of the subpoenaed documents were incriminating. *Id.* at 4-5. This Court addressed "whether serious doubts of constitutionality are raised" by the Price Control Act. *Id.*

> [N]o serious misgiving. . . would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity

> concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator. It is not questioned here that Congress has Constitutional authority to prescribe commodity prices as a war emergency measure[.]

Id. at 32.

This Court drew a sharp distinction between private papers and "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established." *Id.* (quoting *Davis v. United States*, 328 U.S. 583, 589-90 (1946)). The gist of *Shapiro's* holding is that the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes **unrelated to the enforcement of its criminal laws**. *Cf. Baltimore Department of Social Services v. Bouknight*, 493 U.S. 493 (1989)(no implication of Fifth Amendment where state had legitimate non-criminal interest in regulating placement of abused children).

Indeed, the requirements of the Emergency Price Control Act arose out of "an essentially **non-criminal** and **regulatory** area of inquiry." *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 76 (1965)(emphasis added). Therefore, the petitioner in *Shapiro* could not claim the protection of his right against self-incrimination over records which he was required by administrative regulation to preserve and disclose to the government.

Shapiro, of course, presents a completely different fact situation from that presented in Petitioner's case. First, the rationale behind *Shapiro's* decision, which was borrowed from the "collective entity" doctrine, centered around the content of the documents.[4] *Shapiro*, 335 U.S. at 32-33; *Marchetti v. United States*, 390 U.S. 39, 55 (1968).

In Petitioner's case, whether the stolen documents were incriminating is not at issue: "They do not contain any factual assertions by appellant or convey any information from appellant to the Government because they are not prepared or annotated by appellant." *Oxfort*, 44 M.J. at _(Pet. App. at 6a). The real issue here is the act of production, i.e., whether 793(e)'s delivery requirement mandated that Petitioner incriminate himself, in a testimonial manner, for stealing the documents under 793(b). The required records exception should not apply here even if the records in question were determined to be "required records."[5]

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[4] As with the collective entity doctrine, the required records exception focuses on the documents involved. In *Shapiro*, the document itself, and not the act of producing it, drove the Court's determination that the privilege did not apply there.

[5] This issue has not been clarified by this Court, however. *See e.g.* Paul S. Diamond, *Federal Grand Jury Practice and Procedure*, 231 (1990)(since this Court's recognition of the "act of production" doctrine in *Fisher*, there has been confusion about the interplay of the required records exception and the act of production doctrine). Petitioner recognizes that circuit courts addressing this issue have concluded that, where records are determined to be "required records," the act of production doctrine does not apply. *See In re Grand Jury Subpoena*, 21 F.3d 226 (8th Cir. 1994); *In re Grand Jury Subpoena Duces Tecum Served Upon Underhill*, 781 F.2d 64 (6th Cir. 1986).

Second, unlike the non-criminal, regulatory aim of the statute and its requirements in *Shapiro*, Petitioner's case involves 18 U.S.C. § 793, the Espionage Act. The Espionage Act is a criminal statute which is necessarily directed not at regulatory concerns, but criminal ones.

For this reason, Petitioner's case is actually similar to *Marchetti*. There the defendants were required by federal statute to register annually with the Internal Revenue Service and to supply detailed information concerning money acquired through illegal wagering. *Id.* 390 U.S. at 42. On its face, the statute resembled the one in *Shapiro*. The government was purporting to regulate an activity in which it had a legitimate, regulatory interest, i.e., collecting income taxes. This Court, however, disagreed and held the statute's reporting requirement unconstitutional. *Id.* at 61. It posed "real and appreciable" and not merely "imaginary and unsubstantial" hazards of self-incrimination. *Id.* at 48.

> Petitioner . . . was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove **a significant 'link in a chain'** of evidence tending to establish his guilt. . . . [E]very portion of these requirements had the direct and unmistakable consequence of incriminating petitioner; the application of the constitutional privilege to the entire registration procedure was **in this instance** neither 'extreme' nor 'extravagant.'

Id. at 48-49(quoting *United States v. Sullivan*, 274 U.S. 259 (1927)(emphasis added).

This Court also addressed why *Shapiro's* required records exception did not apply. The documents required by statute in *Shapiro* had "public aspects" which were required in an "essentially non-criminal and regulatory area of inquiry." *Marchetti*, 390 U.S. at 56. By contrast, the statute in *Marchetti* was mainly designed to detect and then prosecute illegal wagering. This went well beyond the government's colorable interest in regulating gambling. *Id.* The rationale used to justify the compulsion of documents in *Shapiro* could in no way apply to *Marchetti's* case: "[T]he characteristics of the activities about which information is sought, and the composition of the groups to which inquiries are made, readily distinguish this situation from that in *Shapiro*." *Id.* at 57.

Shapiro's required records exception does not apply in Petitioner's case for the same reason that it did not apply in *Marchetti*. A criminal statute, which Petitioner had violated by stealing documents, required Petitioner to deliver the very same documents to the government. 18 U.S.C. § 793(e) is no simple regulatory measure with only a "mere possibility of incrimination." *Marchetti* 390 U.S. at 53. It is a statute directed at a "selective group inherently suspect of criminal activities," namely, espionage. *Id.* at 57. To punish Petitioner for failing to deliver the documents under 793(e) is to punish him for using his Fifth Amendment Right Against Self-Incrimination. *Cf. Bouknight*, 493 U.S. at 569 (Marshall, J., dissenting)("When the conduct at which a civil statute aims--here child abuse and neglect--is frequently the same conduct subject to criminal sanction, it strikes me

as deeply problematic to dismiss the Fifth Amendment concerns by characterizing the civil scheme as 'unrelated to criminal law enforcement or investigation'"). By complying with 793(e), Petitioner would have provided **more** than the significant "link in a chain of evidence" this Court warned about in *Marchetti*, 390 U.S. 48-49.

Petitioner recognizes that, as in *Shapiro*, the documents here had "public aspects." *Marchetti* made clear that the "public aspect" of the documents is a criterion to consider in the *Shapiro* records-exception calculus. *Marchetti*, 390 U.S. at 57. The documents Petitioner stole were classified documents, stored in a foreign country, which concerned national security matters. They certainly were not Petitioner's private papers. Nevertheless, there are other factors, besides the "public aspects" criterion, to consider in the *Shapiro* analysis:

> The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress.

Marchetti, 390 U.S. at 57.

Shapiro and its progeny have made clear that the crux of the required-records exception analysis is whether the requirement at issue was imposed in an "essentially non-criminal and regulatory area of inquiry" or at a "selective group inherently suspect of criminal activities." *Marchetti*, 390 U.S. at 57. 18 U.S.C. § 793 is, of course, focused on criminals. And, once again, *Shapiro* concerned itself with the incriminating nature of the content of the documents, not the testimonial and evidentiary value of the act of production that was so relevant in Petitioner's case. In the final analysis, notwithstanding the "public aspects" of the documents Petitioner stole, the *Shapiro* required-records exception does not apply here.

C. *MORISON* AND *BRASWELL*

The court below cited two cases in addition to *Shapiro* to support its decision. *Braswell v. United States*, 487 U.S. 99 (1987); *United States v. Morison*, 604 F.Supp. 655 (1985), *cert. denied*, 488 U.S. 908 (1988). Both are inapposite as well.

In his concurring opinion, Judge Sullivan of the court below would have affirmed Petitioner's conviction based on the rationale used in *Morison*. *Oxfort*, 44 M.J. at _ (Pet. App. at 12a). *Morison*, to a certain extent, is similar to Petitioner's case. There the accused was charged and convicted under 793(e). *Morison*, 604 F.Supp. at 657. He, like Petitioner, argued that 793(e) was unconstitutional because it effectively compelled him to incriminate himself by delivering documents. *Id.* at 662. In that case, however, the accused was only charged with failing to deliver documents under 793(e), and then with later transmitting them to a person not

entitled to receive them under 793(d) and thereby converting them under 18 U.S.C. § 641. The accused in *Morison* was not charged with stealing the documents, like Petitioner, under 793(b). *Id.* at 657.

The court rejected his constitutional challenge because, had the accused returned the documents before transmitting and converting them, he would not have committed a crime--the second element of the offense would have been lacking. *Id.* at 662. Therefore delivery would have caused no self-incrimination.

> The statute does not punish or prohibit simply being in unauthorized possession; the statute punishes those who, finding themselves in unauthorized possession, willfully retain or fail to return to the proper government official. Therefore, an individual would not incriminate himself by publicly returning a document to the proper official, because the second element of the crime would not be present.

Id.

Morison would be on point if Petitioner had **only** been charged with failing to deliver the documents under 793(e). That is not so, however. Again, Petitioner was also charged and convicted for stealing the documents. Unlike *Morison* where the offenses of wrongful transmission and conversion were committed **after** the failure to deliver, Petitioner violated 793(b) **before** his failure to deliver because he first stole the documents. Had Petitioner complied with 793(e) by returning the documents, he would have incriminated himself under

793(b). This nicely illustrates why section 793(e) of the Espionage Act is unconstitutional when applied to persons who find themselves in Petitioner's position.

The court below also cited *Braswell* as support. *Oxfort*, 44 M.J. at _(Pet. App. at 10a). There the petitioner was president of two corporations. *Braswell*, 487 U.S. at 101. A federal grand jury subpoenaed his corporations' records. *Id.* Petitioner asserted his right against self-incrimination, not because the contents of the records would incriminate him, but instead because the act of production would. *Id.*

Consistent with precedent this Court held "there is no question but that the contents of the subpoenaed business records are not privileged." *Id.* at 102. Against precedent, however, this Court also held (5-4) that the act of production was not privileged either. *Id.* at 119. This was so in spite of the uncontroverted fact that compliance with the subpoena here would require acts of testimonial self-incrimination from the accused. *Id.* at 122.

This Court's decision hinged on the uniqueness of the corporate form. The petitioner's act of production was "not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation--which of course possesses no such privilege." *Id.* at 110. Ultimately, this Court provided its rationale for what appeared to be a holding inconsistent with precedent:

> We note further that recognizing a Fifth Amendment privilege on behalf of the

> records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute "white collar crime," one of the most serious problems confronting law enforcement authorities. 'The greater portion of evidence of wrongdoing by an organization or its representatives is usually found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible.'

Id. at 115 (quoting *United States v. White*, 322 U.S. 694, 700 (1944)).

In dissent, Justice Kennedy condemned the Court's manipulation of previous collective entity cases. *Id.* at 120. The holding was a deviation from the long line of "analytic clarity in Fifth Amendment doctrine that has taken almost a century to emerge." *Id.* at 119. In sharp disagreement with the majority, Justice Kennedy saw a clear difference between a subpoena which compels release of corporate documents which are incriminating from a subpoena which compels a corporate representative to act in an incriminating and testimonial manner when producing subpoenaed documents:

> The act of producing documents stands on an altogether different footing. While a custodian has no necessary relation to the contents of documents within his control, the act of production is inescapably his

> own. Production is the precise act compelled by the subpoena, and obedience, in some cases, will require the custodians own testimonial assertions.

Id. at 124.

The dissent then concluded:

> The majority's abiding concern is that if a corporate officer who is the target of a subpoena is allowed to assert the privilege, it will impede the Government's power to investigate corporations, unions, and partnerships, to uncover and prosecute white-collar crimes[.] . . . [T]he text of the Fifth Amendment does not authorize exceptions premised on such rationales.

Id.

In spite of this split decision, two things nonetheless remain clear. First, this Court went to great lengths to limit this holding to corporations and the government's related interest in prosecuting "white collar" crime. Second, *Fisher* and *Doe I*'s recognition of the application of the Fifth Amendment's right against self-incrimination to certain testimonial acts of production still survives. *Braswell*, 497 U.S. at 104; *Smith v. Richert*, 35 F.3d 300, 304 (7th Cir. 1994).

Braswell's holding, therefore, should not affect Petitioner's case. Petitioner was an active duty Sailor who stole classified documents from the U.S. Navy. He does not represent a corporation nor does the statute

under which he was prosecuted concern itself with "white collar" crime.

In non-corporate contexts, therefore, the plenary protections of the Fifth Amendment against compulsion of evidence by the U.S. Government still apply. Indeed, as mentioned before, the "collective entity" doctrine is relevant in Petitioner's case only for its analysis of how the Fifth Amendment may apply to acts of production which are both **testimonial and incriminating**.

D. PETITIONER'S SELF-INCRIMINATION

Petitioner recognizes that 793(e)'s delivery requirement would in no way be unconstitutional when applied to someone who innocently came into possession of classified documents. The statute would merely require that person to locate an authorized government official to whom the documents could be returned. On its face, 793(e) is constitutional. In Petitioner's case, on the other hand, the delivery requirement of 793(e) is precisely the type of "ingeniously drawn legislation" that this Court warned of in *Marchetti*, 390 U.S. at 51. The statute, whether or not by design, compels someone like Petitioner into the arms of the government with all the evidence the government would need for prosecution.

With Petitioner, who was not under suspicion of committing an offense, the delivery of the documents would have communicated that he was the thief of the documents, which would have created evidence of his wrongdoing. This evidence would undoubtedly have been the cornerstone of the government's case. It would have been the "significant link in the chain of evidence" that drove this Court to deem the statute in *Marchetti*

unconstitutional. 390 U.S. at 39.

E. VIOLATION OF 18 U.S.C. § 793(b) DOES NOT WAIVE FIFTH AMENDMENT GUARANTEES

Finally, the lower court indicates in its opinion that because Appellant stole the documents, his privilege against self-incrimination was somehow diminished. *Oxfort*, 44 M.J. at _(Pet. App. at 9a). After noting that the privilege might not apply where a person assumes control over items that are the legitimate object of the government's non-criminal regulatory powers, the court stated that "[c]ertainly, the privilege is reduced even more when the custody of the documents is illegal." *Id.*

In *Marchetti*, this Court rejected a similar line of reasoning which stated that because the gamblers were aware of the statute's registration requirements, and therefore were given the options of either complying with the statute or not gambling, their Fifth Amendment privileges were waived. 390 U.S. at 51. This Court stated:

> The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it. . . . To give credence to such "waivers" without the most deliberate examination of the circumstances

> surrounding them would ultimately license widespread erosion of the privilege through 'ingeniously drawn legislation.'

Id.

By factoring Petitioner's theft of the documents into its consideration of whether 793(e) is unconstitutional, the lower court exacerbated their already flawed analysis of this Court's "analytic clarity in Fifth Amendment doctrine[.]" *Braswell*, 487 U.S. at 119 (Kennedy, J., dissenting)(5-4).

Conclusion

The right against self-incrimination protects a person from being compelled in a criminal case to be a witness against himself. This Court has repeatedly stated that the privilege applies to acts of production that are both testimonial and incriminating.

18 U.S.C. § 793(e) required Petitioner to perform an act of production that would have been testimonial and incriminating. Nevertheless, the Court below deemed 793(e)'s delivery requirement constitutional because the documents Petitioner stole were "required records." Their holding is misplaced, however, for two reasons: first, the documents in question were not "required records;" second, even if they were, the "required records" exception does not apply to cases involving the act of production doctrine.

This Court should grant review of this petition to resolve the important question of whether 18 U.S.C. 793(e) is unconstitutional in cases where the accused has

also violated 793(b) by stealing the documents. This is especially important where the lower court erroneously interpreted this Court's precedent concerning the "required records" exception.

Respectfully submitted,

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December 1996

APPENDICES

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 94-0282

CMR No. 91-2649

United States, *Appellee*

v.

Paul J. OXFORT, Cryptologic Technician
Communications Seaman,
U.S. Navy, *Appellant*

Argued Oct. 31, 1995

Decided Aug. 30, 1996

For Appellant: *Captain J.F. Havranek*, USMC, (argued); *Major Hagen W. Frank*, USMC (on brief); *Lieutenant L. Burnett*, JAGC, USNR.

For Appellee: *Lieutenant David M. Harrison*, JAGC, USN (argued); *Colonel T.G. Hess*, USMC, *Commander S.A. Stallings*, JAGC, USN, *Lieutenant Commander David B. Auclair*, JAGC, USN (on brief).

Opinion of the Court

CRAWFORD, Judge:

Pursuant to his pleas, appellant was convicted at Yokosuka, Japan, of violating a lawful general regulation by wrongfully removing, copying or failing to properly safeguard classified materials (3 specifications); housebreaking; and violating a federal statute relating to the safeguarding of classified materials (4 specifications), in violation of Articles 92, 130, and 134, Uniform Code of Military Justice, 10 USC §§ 892, 930, and 934, respectively. The convening authority approved the sentence by the military judge of a dishonorable discharge, 15 years' confinement, total forfeitures, and reduction to pay grade E-1. The Court of Military Review [1] affirmed. We granted review of the following issue:[2]

> WHETHER THAT PORTION OF 18 USC § 793(e) REQUIRING UNAUTHORIZED POSSESSORS OF NATIONAL DEFENSE MATERIAL TO DELIVER THE MATERIAL TO AN OFFICIAL AUTHORIZED TO RECEIVE IT VIOLATES APPELLANT'S ARTICLE 31(a), UCMJ, RIGHTS WHERE COMPLIANCE WITH THAT MANDATE WOULD HAVE NECESSARILY

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[1] *See* 41 MJ 213, 229 n.* (1994).

[2] We also granted review (40 MJ 41) of two other issues disposed of adversely to appellant's interest in *United States v. Roller*, 42 MJ 264 (1995)(Issue II), and *United States v. Mitchell*, 39 MJ 131 (CMA 1994)(Issue III).

INCRIMINATED HIM BOTH IN OTHER VIOLATIONS OF THE SAME STATUTE AND OF THE UCMJ.

We hold that the requirement in 18 USC § 793(e) for the "unauthorized" possessor of classified information to deliver the material to an authorized official does not violate Article 31(a), UCMJ, 10 USC § 831(a), or the Fifth Amendment to the Constitution.

Facts

This issue arises from specification 3 of Charge III, under which appellant was convicted of violating 18 USC § 793(e) by his failure to return classified documents to a person authorized to receive them.

Appellant removed numerous classified messages from a Sensitive Compartmented Information Facility (SCIF) at Yokota Air Base, Japan, with the dual intention of passing them along to individuals who were not "authorized to receive" them and to show a "lack of security" at the command. These documents were later found by Air Force Security Police Investigators when they searched appellant's car after he had been apprehended by the Japanese police on unrelated matters. The search took place on the Yokota Air Base after the car had been removed from the Japanese impoundment lot. The record does not reveal whether any Japanese nationals ever saw or took possession of any of the documents. Appellant agreed with the military judge that his possession of the messages in his car was "unauthorized."

Discussion

The phrases in the Fifth Amendment that "No person ... shall be compelled in any criminal case to be a witness against himself" and Article 31(a) that "No person ... may compel any person to incriminate himself ...." are vague. Mil.R.Evid. 301(a), Manual for Courts-Martial, United States (1995 ed.), expands on them by recognizing that these expressions of privilege only protect "evidence of a testimonial or communicative nature." *See also Fisher v. United States*, 425 U.S. 391, 408 (1976). The issue in this case centers on the following: First, what is a testimonial or communicative act; second, is there a required-records exception to the protection accorded a testimonial or communicative act; and third, if the act of production of the documents in incriminating, is there limited testimonial immunity for such production?

Testimonial or Communicative Act

For an act "to be testimonial" or communicative, it "must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990), quoting *Doe v. United States*, 487 U.S. 201, 210 (1988). The Fifth Amendment and Article 31(a) prevent compelling a defendant to furnish direct evidence as to past criminal acts. *See, e.g., Glickstein v. United States*, 222 U.S. 139 (1911). An individual may not be asked questions about known relationships with criminals or particular facts and circumstances surrounding a crime. *See, e.g., Hoffman v. United States*, 341 U.S. 479 (1951); *United States v. Jones*, 31 MJ 189 (CMA 1990).

Certain acts are not considered testimonial or communicative in nature: *e.g.*, compelled giving of body fluids: *Schmerber v. California*, 384 U.S. 757 (1966) (blood sample); *United States v. Armstrong*, 9 MJ 374 (CMA 1980) (blood sample); *Murray v. Haldeman*, 16 MJ 74 (CMA 1983) (urine specimen); compelled handwriting; *United States v. Mara*, 410 U.S. 19 (1973); *Gilbert v. California*, 388 U.S. 263, 266 (1967); *United States v. Harden*, 18 M.J. 81 (CMA 1984); compelled voice exemplars: *United States v. Dionisio*, 410 U.S. 1 (1973); *United States v. Wade*, 388 U.S. 218, 222-23 (1967); *United States v. Akgun*, 24 MJ 434 (CMA 1987); *United States v. Chandler*, 17 MJ 678 (ACMR 1983); slurred speech: *Pennsylvania v. Muniz*, 496 U.S. at 590-91, 110 S. Ct. At 2638, 2644 (at least eight Justices concluded that the "slurred nature" of Muniz' speech was not "testimonial"); requiring a suspect to don or remove clothes: *United States v. Wade*, *supra* at 222; *Holt v. United States*, 218 U.S. 245, 252-53 (1910); or to supply fingerprints: *Schmerber v. Caltfornia*, *supra* at 764.

Likewise, compelling a defendant to sign a consent form authorizing a bank to disclose certain account records does not illicit a testimonial or communicative act. *Doe v. United States*, 487 U.S. 201 (1988). According to Justice Blackmun:

> There are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts. The vast majority of verbal statements thus will be testimonial and, to that extent at least, will fall within the privilege.

Id. At 213-14.

Only when a person is "compelled to be a 'witness' against himself" by "relat[ing] a factual assertion or disclos[ing] information" is there a resulting testimonial or communicative act. *Id.* at 210. The privilege does not apply when the defendant is not required to disclose any personal knowledge. *Id.* At 217. "[I]t is not enough [to make it "privileged"] that the compelled communication is sought for its content. The content itself must have testimonial significance." *Id.* At 211 n.10.

Setting aside the act of production, the requirement under the statute that the possessor of national defense material deliver them to an authorized official does not have "testimonial significance." Appellant is not required to make any statement expressly or by implication concerning these documents. They do not contain any factual assertions by appellant or convey any information from appellant to the Government because they are not prepared or annotated by appellant. Thus, other than the act of production, returning the document is not compelled testimony or a compelled response.

Required-Records Exception

Assuming testimonial significance to the communication, the privilege does not protect an individual from turning over organizational documents or property. *Braswell v. United States*, 487 U.S. 99, 100 (1988) (requiring custodian of corporate records to turn over subpoenaed records, even when they might incriminate possessor of documents). The Fifth Amendment is not violated when the Government is allowed "to gain access to items or information vested with ... [a] public character." *Baltimore City Department*

of Social Services v. Bouknight, 493 U.S. 549, 557 (1990).

In 1911, Justice Holmes commented as follows concerning an order to produce an accountant's books: "The question is not of testimony but of surrender - not of compelling the bankrupt to be a witness against himself in a criminal case, present or future, but of compelling him to yield possession of property that he no longer is entitled to keep." *In re Harris*, 221 U.S. 274, 279 (1911). The Court has further refined Justice Holmes' language to limit the Government's authority to request information based on (1) whether the disclosure requirement is "essentially regulatory" as opposed to criminal in nature (*Grosso v. United States*, 390 U.S. 62, 68 (1968)); (2) whether the regulation focuses on "a highly selective group inherently suspect of criminal activities," *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 79 (1965); and (3) whether there is more than "a 'mere possibility' of incrimination" but "a significant 'link in a chain' of evidence." *Marchetti v. United States*, 390 U.S. 39, 48 (1968)(footnote omitted); *United States v. Williams*, 29 MJ 112, 115-16 (CMA 1989). Under the required-records exception, the Government may obtain information it needs for civilian regulatory reasons even if it might incriminate the possessor. *See, e.g., Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 856-58 (1984) (holding that statutory requirement compelling college students to register for draft in order to qualify for loans (*id.* at 844) did not violate Self-Incrimination Clause).

The Court has refined this limited access to those instances when the Government has "a sufficient relation

between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records ...." *Shapiro v. United States*, 335 U.S. 1, 32 (1948).

In *Shapiro*, the Supreme Court held (5-4) that the Fifth Amendment did not prevent compelling production of the defendant's customary business records required to be kept under the Emergency Price Control Act. Otherwise, in *Marchetti v. United States*, 390 U.S. at 55-57, the Supreme Court held that the required-records doctrine did not apply where defendant would have been convicted for failing to register and pay an occupational tax for engaging in the proscribed business of wagering.

Justice Harlan in *Marchetti* compared this case to *Shapiro* and explained why the required-records doctrine did not apply, stating:

> Each of the three principal elements of the [required-records] doctrine, as it is described in *Shapiro*, is absent from this situation. First, petitioner Marchetti was not, by the provisions now at issue, obliged to keep and preserve records "of the same kind as he has customarily kept"; he was required simply to provide information, unrelated to any records which he may have maintained, about his wagering activities. This requirement is not significantly different from a demand that he provide oral testimony. Second, whatever "public aspects" there were to the records at issue in *Shapiro*, there are none to the information demanded from

> Marchetti. The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress. Third, the requirements at issue in *Shapiro* were imposed in "an essentially non-criminal and regulatory area of inquiry" while those here are directed to a "selective group inherently suspect of criminal activities." The United States' principal interest is evidently the collection of revenue, and not the punishment of gamblers; but the characteristics of the activities about which information is sought, and the composition of the groups to which inquiries are made, readily distinguish this situation from that in *Shapiro*.

390 U.S. at 56-57 (citations omitted).

In *Braswell*, Chief Justice Rehnquist noted that "the official records and documents of the organization that are held by [the agent] in a representative rather than a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate [the agent] personally." 487 U.S. at 107, quoting *United States v. White*, 322 U.S. 694, 699 (1944). As the Supreme Court commented in *Bouknight*: "When a person assumes control over items that are the legitimate object of the government's noncriminal regulatory

powers, the ability to invoke the privilege is reduced." 493 U.S. at 558, 110 S. Ct. at 906. Certainly, the privilege is reduced even more when the custody of the documents is illegal.

The required-records exception applies in this case. There is little evidentiary cost to the accused, a clear interest by the Government in protecting the records, and an interest that is not aimed "at a highly selective group inherently suspect of criminal activities." *Albertson v. SACB*, 382 U.S. at 79. The social cost of requiring the defendant to turn over these documents is minimal, if even non-existent, depending on the act of production. The classified document did not require appellant to relate a factual assertion or disclosure, or any personal knowledge, and the content itself did not have "testimonial significance." *See Fisher v. United States*, 425 U.S. at 412. However, the issue does arise as to whether surrender of the documents, or what is commonly called the act of production, is testimonial.

Act of Production

Whether the act of production is testimonial has perplexed the Supreme Court. *Braswell v. United States* and *Fisher v. United States*, both *supra*. The Court addressed this question in *Fisher* and held that the act of production was not of testimonial significance, because the location of the papers was "a foregone conclusion." 425 U.S. at 411.

This view was sharply criticized by Justice Brennan in his separate opinion in *Fisher*, where he stated: "[M]erely because the Government could readily have otherwise proved existence" of the document does not

mean that its surrender is not of testimonial significance. *Id.* At 428. Later in *Braswell* this issue was again addressed. Chief Justice Rehnquist distinguished *Curcio v. United States*, 354 U.S. 118 (1957), *citing United States v. White*, 322 U.S. 694, 696 (1944). 487 U.S. at 113-15. He stated that a corporate agent assumes the risk of producing documents as part of the job, but not the risk of oral testimony. 487 U.S. at 113-14. He reasoned that recognizing the production privilege for custodians of records "would have a detrimental impact on the Government's efforts to prosecute 'white collar crime[.]'" *Id.* At 115. To give use immunity for the act of production would also pose a problem for the Government because the act of production might taint other evidence. *Id.* at 116-17.

Justice Kennedy, writing also for Justices Brennan, Marshall, and Scalia in *Braswell*, indicated that the majority was "manipulat[ing]" the Fifth Amendment by not stating that the act of production was indeed a "testimonial act." *Id.* at 120, 125.

Here, there are diverse means of production. Thus, like the Court in *Bouknight*: "We are not called upon to define the precise limitations that may exist upon the State's ability to use the testimonial aspects" of producing the documents in a prosecution. 493 U.S. at 561, 110 S. Ct. At 908.

Article 31(a) of the Uniform Code of Military Justice and the Fifth Amendment of the Constitution protect an individual's right not to incriminate oneself. Nevertheless, the provisions of 18 USC § 793(e) do not compel a violation of those rights. Clearly there was an act of production involved here, but for appellant this

was not a testimonial act. Further, even if this act had any testimonial significance, it is excluded from protection under the required-records exception as found by the Supreme Court.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge COX and Judge GIERKE concur.

SULLIVAN, Judge (concurring in the result):

I would simply resolve appellant's constitutional claim against him for the reasons stated in *United States v. Morison*, 604 F.Supp. 655, 662 (D.Md.), *appeal dismissed*, 774 F.2d 1156 (4th Cir. 1985). There, the District Court said:

> SELF-INCRIMINATION
>
> Morison also argues that § 793(e) is unconstitutional because it requires a sacrifice of the Fifth Amendment right against self-incrimination. Section 793(e) provides that one who is in unauthorized possession of a document or information and who willfully retains it or fails to deliver it to the official entitled to receive it is guilty of an offense. Defendant argues that this is "tantamount to a requirement that one who determines that he is in unauthorized possession of documents covered by this section must disclose this fact to a government official." The government has responded by noting that the documents could be returned anonymously, an

> argument which the defendant calls "ingenuous." There is some merit to the defendant's argument that an anonymous return would not solve the problem, because the government could find out through fingerprint analysis, etc., who had been in possession of the document. One wonders, however, who the government would prosecute after going to all that trouble. The statute does not punish or prohibit simply being in unauthorized possession; the statute punishes those who, finding themselves in unauthorized possession, willfully retain or fail to return [sic] to the proper government official. Therefore, an individual would not incriminate himself by publicly returning a document to the proper official, because the second element of the crime would not be present. The statute on its face therefore does not require a defendant to sacrifice his right against self-incrimination and is not unconstitutional.

EVERETT, Senior Judge (concurring in the result):

Under the rationale of *Shapiro v. United States*, 335 U.S. 1 (1948), I believe that Congress lawfully can impose a requirement that anyone entrusted with documents affecting the national security not willfully retain those documents or fail to deliver them to the officer or employee of the United States entitled to receive them. In my view, the potentially disastrous consequences of the violation are so great that an accused should not be entitled under the Fifth Amendment to excuse noncompliance on grounds of self-incrimination.

However, I also conclude that implicit in the language of 18 USC § 793(e) is a legislative intent that someone who delivers national defense documents or information "to the officer or employee of the United States entitled to receive it" is not subject to the risk of having this act of production used to incriminate that person. [1] In view of the importance of national defense documents or information, I infer that Congress never intended to allow the act of production to be used in evidence at a later trial by the prosecution. Therefore, under 18 USC § 793(e), no evidence can be admitted, over defense objection, as to the manner in which the national security documents were returned to the Government's possession.

Because I am convinced that 18 USC § 793(e) does not on its face violate the Fifth Amendment and would not be applied in a manner that created an unconstitutional risk of self-incrimination, I perceive no improvidence in appellant's guilty pleas to a violation of this statute. Therefore, I concur in affirming the conviction.

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[1] It would seem that in many instances the production can be accomplished in such a manner that it will not be incriminating. However, even when this is not the case, the duty to produce the national defense documents still remains.

APPENDIX B

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW
BEFORE

ALBERT A. REED R.M. MOLLISON
R.A. JONES

UNITED STATES

v.

Paul J. OXFORT, 213-94-6822
Cryptologic Technician Communications Seaman (E-3)
U.S. Navy

NMCM 91 2649 Decided 8 October 1993

Sentence adjudged 18 June 1990. Military Judge: Philip F. Roberts. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Seventh Fleet, FPO San Francisco 96601-6003.

Capt DWIGHT H. SULLIVAN, USMC, Appellate Defense Counsel
LCDR LAWRENCE W. MUSCHAMP, JAGC, USN, Appellate Government Counsel

PER CURIAM:

We have examined the record of trial, the assignments

of error,[1] and the Government's reply thereto, and we

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[1] I. THE FINDING OF GUILTY TO THE 18 U.S.C. § 793(f) VIOLATION IS INCONSISTENT WITH THIS COURT'S OPINION IN *UNITED STATES V. CHATTIN.*

II. CHARGE I, SPECIFICATION 1 IS MULTIPLICIOUS WITH CHARGE III, SPECIFICATION 1 FOR FINDINGS PURPOSES.

III. THE MILITARY JUDGE ERRED BY ADMITTING INTO EVIDENCE AN EXHIBIT IN WHICH A VICE ADMIRAL OPINED THAT APPELLANT'S OFFENSES "ARE DESERVING OF SEVERE PUNISHMENT." (This assignment was subsequently withdrawn by appellate defense counsel).

IV. PARAGRAPH 60c(5)(a) OF THE 1984 MANUAL, A BINDING PROVISION ADOPTED BY THE PRESIDENT PURSUANT TO HIS POWERS UNDER ARTICLE 36, PRECLUDES CHARGING A SERVICE MEMBER UNDER ARTICLE 134 IF THE SAME MISCONDUCT CAN BE CHARGED AS AN ARTICLE 92 VIOLATION. (CITATION OMITTED.)

V. THE COURT-MARTIAL DID NOT HAVE JURISDICTION BECAUSE THE MILITARY JUDGE WAS NOT APPOINTED TO A FIXED TERM OF OFFICE. (CITATION OMITTED).

VI. THIS COURT HAS NO JURISDICTION BECAUSE ITS JUDGES ARE NOT APPOINTED TO FIXED TERMS OF OFFICE. (CITATION OMITTED.)

VII. APPELLANT'S COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION. (CITATION OMITTED.)

VIII. BECAUSE THIS COURT'S JUDGES WERE APPOINTED IN VIOLATION OF THE APPOINTMENTS CLAUSE, THIS COURT HAS NO POWER TO REVIEW APPELLANT'S CASE. (CITATION OMITTED.)

IX. THE RECORD OF TRIAL IN THIS CASE IS

have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed.

Contrary to appellant's stated position in reliance on *United States v. Chattin*, 33 M.J. 802 (N.M.C.M.R. 1992), this Court has subsequently ruled that appellant's conduct, as elicited during the course of the providence inquiry, falls within the ambit of 18 U.S.C. § 793(f). *United States v. Roller*, ____ M.J. ____, No. 92-00437 (N.M.C.M.R. 30 July 1993) (en banc).

Notwithstanding the government's concession, this Court, having the benefit of the Court of Military Appeals' recent analysis in *United States v. Teters*, Dkt. No. 67,692, ____ M.J. ____, (August 12, 1993) finds that the first specifications of Charges I and III are not multiplicious for findings purposes.

Appellant's assignments of error IV-VIII are without merit. *United States v. McGuinness*, 35 M.J. 149 (C.M.A. 1992); *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), *cert. granted*, ____ U.S. ____, 113 S.Ct. 2412 (1993); *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992); and the supplemental assignment of error has been mooted as the original record of trial has been reviewed within the sensitive compartment information facility (SCIF) located at the Naval Criminal Investigative Service Headquarters, Washington, D.C. Accordingly, the findings of guilty and the sentence as approved on review below are affirmed.

INCOMPLETE.